EXIT SEARCHES: BEFORE YOU LEAVE, LET ME LOOK IN YOUR BRIEFCASE, BAG AND CAR

I. INTRODUCTION

“Lurking in plain sight at exits to certain United States government buildings are fixed checkpoints where people are detained and their personal belongings systematically searched before armed police officers give permission to depart the premises.”¹ Does the government actually search employees, visitors and their belongings on the way out of its facilities? These searches cannot be justified in light of the Fourth amendment.² They are unconstitutional, an invasion of privacy, and offensive to the many people subjected to them every day.

Far more pervasive than exit searches by government entities are exit searches by private businesses. Employees of numerous retail establishments, both warehouses and stores, are subjected to a variety of search procedures as they leave the workplace.³ Workers at nuclear power plants and other facilities associated with the nuclear industry are subjected to searches of their persons and possessions as they head home for the evening.⁴ Anyone could be stopped for a bag search on the way out of the New York Public Library.⁵ Employees of specialty chemical and precious metals plants run the gauntlet of an elaborate security system every time they leave work for the night.⁶ Employees of private employers can claim no

² U.S. CONST. amend. IV.
³ See infra Section II.D (describing retail facilities’ search protocols).
constitutional invasion of their privacy since the searches are not by representatives of the government, but can these employees claim an invasion under some other law? Is it even worth the fight, since most are employees at will, with little recourse against employers’ invasions into their lives?

Most people, if not all, would think exit searches, performed by a public or private employer, are without exception, an invasion of a worker’s privacy. The relevant question though, is that invasion lawful and Constitutional? The government claims higher interests of national security, and protections of national treasures, both seemingly valid reasons. Since background checks have been mandatory for civil servants since 1953,7 one could question the marginal return on the costs of exit searches. But what of facilities that have no such higher callings? Is prevention of theft a governmental interest that outweighs an employee’s individual privacy interest? Most private employers rely on prevention of theft as their rationale for infringing upon employee privacy, but since they do not need to meet as high a standard as the government for a privacy invasion, challenges to their right to perform the searches are exceedingly rare. In either case, these searches belie a distrust for the people that they have hired and entrusted with maintaining and growing their businesses.

A. Origin of Exit Searches

The source of exit searches appears, simply, to be protection from Communism. The Internal Security Act of 19508 was promulgated, “To protect the United States against certain un-American and subversive activities by requiring registration of Communist organizations, and for

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This Act discusses the authority of the Secretary of Defense and his designees to promulgate regulations and orders for the protection and security of all military facilities. It is unsurprising that national security originally sparked the need for these searches, since entry searches at other government facilities are also an outgrowth of security needs. In the late 1960’s, there was a spate of bombings and bomb threats in federal buildings. To combat these threats and restore peace of mind, the General Services Administration (GSA), which is responsible for facilities and real property for a majority of the federal government, issued instructions to its regional administrators to monitor all individuals and the packages they carry when entering federal facilities.

B. What is an Exit Search?

Exit searches used by employers fall into several categories. Some facilities have armed guards perform a routine bag, backpack, and briefcase check. Private employers often have managers perform these searches. There can also be a random bag or car search when leaving a federal facility, as was employed in United States v. Gonzalez, discussed in Part III of this paper. These are referred to as gate searches when the facilities are military installations. Another category of search is of the person and property upon crossing the

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10 Id. at 1005-06.
12 Id. (Under 40 U.S.C. Sec. 318a and 318b, GSA had the power to promulgate regulations for the government of federal property it controlled. In 2002, this was superseded by 40 U.S.C.A. § 1315, transferring this responsibility to the Department of Homeland Security).
13 In this paper, I will use exit search and bag search interchangeably.
14 Dorey, supra note 1, at 75.
16 300 F.3d 1048, 1050 (9th Cir. 2002).
national border, but for the purposes of this paper, the focus of my research is on the first two search types.

Part II of this paper explores the regulatory structure surrounding exit searches, the case law supporting this structure, as it exists today, and the framework in place to support the searches, as well as exit search regimes in place at military installations, select federal agency buildings, and a number of private employers. Part III examines how the courts have dealt with exit searches and their invasions of privacy in the limited cases where searches have come before the courts. It also analyzes the justifications and rationalizations for these searches. Finally, the paper concludes by acknowledging that in some cases, the employer interests in performing exit searches, supported by a larger public purpose, outweigh an employee’s privacy interests as defined by the applicable law. It suggests methods of ensuring that exit searches minimize the intrusion into the employee’s privacy interests.

II. BACKGROUND

A. Federal Laws and Regulations Affecting Exit Searches and Existing Protocols

Exit searches by federal employers occur under the auspices of a complicated regulatory regime, starting with the U.S. Constitution and Congressional Acts, cascading down to agency and Department of Defense (DoD) regulations and directives. This subsection examines pieces of this regulatory environment.

1. Fourth Amendment

Any discussion involving search must start with an examination of the Fourth Amendment, which provides, "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." \(^{17}\) This was included by the

\(^{17}\) U.S. CONST. amend. IV.
founding fathers to protect citizens from unreasonable searches of their belongings by the government. It is incorporated by the Fourteenth amendment to state governments. In *Katz United States*, the Supreme Court held that the Fourth Amendment, “protects people, not places. What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected.”

Under this standard one would think personal possessions that an employee carries to and from her office, could still be protected from a search, without a warrant, or at least probable cause. This protection seems to be enforced in *O’Connor v. Ortega*, where Justice O’Connor stated that just because an employee brings a handbag to the office does not make it part of the workplace context. “The appropriate standard for a workplace search does not necessarily apply to a piece of closed personal luggage, a handbag or a briefcase that happens to be within the employer’s business address.” So, one should have a reasonable expectation of privacy with respect to these items even though one works for the government.

But the *Ortega* Court put limits on government employees’ reasonable expectations of privacy because of the objectives and missions of the government agencies. The limits mentioned in the decision include abridging the burden of having to get a warrant when it frustrates the government’s purpose, exceptional circumstances that make a warrant and probable cause impractical, the need for the agency to efficiently and quickly perform its

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18 Dorey, *supra* note 1, at 79.
22 *Id.*
23 *Id.* at 717.
24 *Id.*
functions, and the need to protect government property.\textsuperscript{25} The Court also makes mention of agency regulations, which could affect the constitutionality of a search of an employee’s possessions.\textsuperscript{26} Thus, this paper turns to an exploration of agency regulations, which can be controlling of exit searches.

2. Agency Regulations Affecting Exit Searches

The GSA is responsible for over 9,600 federally owned and leased facilities.\textsuperscript{27} It assists agencies in the acquisition of space in federal and commercial facilities, facility design and construction, as well as property management and security. Given this all-encompassing responsibility for federal property, Congress gave the Administrator of GSA broadness of authority similar to that given by the Ortega Court for dealing with the agency’s responsibilities. “The Administrator shall prescribe regulations that the Administrator considers necessary to carry out the Administrator’s functions . . . the head of each executive agency shall issue orders and directives that the agency head considers necessary to carry out the regulations.”\textsuperscript{28} Using this authority, GSA promulgated its own regulation, allowing individual agencies to initiate their own security measures; it states, “Federal agencies may, at their discretion, inspect packages, briefcases and other containers in the immediate possession of visitors, employees or other persons arriving on, working at, visiting, or departing from Federal property.”\textsuperscript{29} This regulation delegates authority to each federal agency to set up its own standards, within its own building or space, for searches upon entering or leaving.

\textsuperscript{25} Id. at 720.
\textsuperscript{26} Id. at 717.
\textsuperscript{27} GEN. SERV. ADMIN., https://gsa.gov/portal/content/154498 (last visited Feb. 27, 2017).
\textsuperscript{28} 40 U.S.C.A. § 121(c)(2) (West, Westlaw current through P.L. 114-316).
\textsuperscript{29} 41 C.F.R. § 102-74.370 (West, Westlaw current through Feb. 23, 2017; 82 FR 11412).
Anyone who objects to these searches can be subject to a fine, imprisonment for up to 30 days, or both.30

The Bureau of Engraving and Printing (BEP) and the Library of Congress are two agencies, which conduct employee exit searches31 and have promulgated regulations regarding those searches. The BEP’s recently updated regulations, proclaiming its properties as high-security facilities with access limited to BEP employees and people having official business with the BEP.32 The regulations outline the types of entry and exit searches, which all persons can expect to encounter:

(5) All persons entering and exiting the property may be subject to screening devices and shall submit to screening upon request by BEP Police or authorized officials.
(6) All persons entering and exiting the property may be subject to search or inspection of their person, handbags, briefcases, and other handheld articles by BEP Police or authorized officials. All persons on the property may be subject to additional search or inspection by BEP Police or authorized officials upon entry, exit, and request.
(7) All motor vehicles entering, exiting, or located on the property are subject to search or inspection of the exterior and interior compartments by BEP Police or authorized officials at any time.33

The BEP Manual then outlines the specific entry/exit screening policy, which is followed by the BEP police.34 All employees must submit to metal detector exit searches, as well as having all packages and articles screened.35 The guards will perform mandatory exit searches using x-ray machines or hand inspect all of the bags, briefcases, etc.36 The guards may

31 Dorey, supra note 1, at 78 n.13 (“For example, agencies as disparate as the Bureau of Engraving and Printing (BEP) and the Library of Congress in Washington, D.C. conduct routine entry and exit searches of both employees and visitors.”).
32 Federal Register, Vol. 18, No. 43, Friday, March 4, 2016, Rules and Regulations at 11433.
33 Id.
35 Id.
36 Id.
perform random searches of coats, pockets, etc. to enhance the security procedures.\textsuperscript{37} The manual expressly mentions that the guards should be watchful for, “concealed weapons, illegal drugs, security items, and Bureau property.”\textsuperscript{38}

The Library of Congress’s notice of searches is more easily found, probably due to the Library’s accessibility to the public at large. Its website warns visitors of potential exit searches.\textsuperscript{39} Section 702.9 of the regulations explains that individuals may have any packages and containers searched on entry, and are required to register any privately owned office machines with a police officer. Section 702.10 describes the penalties for anyone who steals or destroys library materials or government property. One can infer from these sections of the regulations, that any individual leaving the premises must also have possessions checked in order to ensure that she leaves with the same private machine which she brought in, and is not trying to leave with library materials.

Prior to 9/11, an entry search for the Library of Congress was a much quicker process than an exit search.\textsuperscript{40} “Leaving the library, however, was an ordeal. It used to involve a Library of Congress Police officer removing everything from briefcases and backpacks and thumbing through books and papers to ensure that nothing was leaving that shouldn't.”\textsuperscript{41}

Interestingly, since 9/11, the search regimes for entry and exit have reversed, with entry now being more difficult and seemingly all in the name of safety.\textsuperscript{42} This reversal does not change the invasion of privacy experienced by employees (now it is a worse invasion on entry than it

\textsuperscript{37} Id.
\textsuperscript{38} Id.
\textsuperscript{41} Id.
\textsuperscript{42} Id. (“To leave, officers peek into partially opened bags and do not typically bother to inspect books or folders.”).
was, formerly, on exit), but the different, post-9/11 reasoning may be more acceptable to some. Another difference in the search protocol is the security force which is performing the search. Until 2008, the Library of Congress had its own police force, but at that time, it merged into the U.S. Capitol Police. The difference in the missions of the two forces has made the invasiveness of the exit search dramatically drop as the Capitol police are more concerned with safety than theft.

The U.S. Mint has promulgated entry and exit procedures for various mint facilities in accordance with 31 C.F.R. Part 91. These exit procedures require all employees, along with their hand-carried bags and items, to be screened before they can leave the facilities. The security screening process can involve magnetometers, x-rays, as well as visual inspections if the officer performing the inspection cannot identify the item through the normal process. The San Francisco, Philadelphia and West Point facilities supplement MD 10D-33 with their own memoranda providing more details as to their specific exit procedures. For example, the Philadelphia memorandum states that jewelry, belts, footwear and objects containing metal must go through the x-ray machine and no coins may be removed from the premises. In addition, if a person cannot clear the magnetometer after three attempts, she will be hand-scanned, and if the officer determines that government

43 Id.
44 Id.
46 31 C.F.R. § 91.1 (West, Westlaw current through Feb. 23, 2017; 82 FR 11412) (“The regulations in this part governing conduct in and on the Bureau of the Mint buildings and grounds . . . are promulgated pursuant to the authority vested in the Secretary of the Treasury, including 5 U.S.C. 301, and that vested in him by delegation from the Administrator of General Services.”).
48 Id. at 2.
50 Memorandum for All Philadelphia Mint Employees (August 8, 2013).
property is not the cause of the problem, the person will be allowed to leave but, a report is filed with the employee’s supervisor.\textsuperscript{51}

The U.S. Department of Energy (DOE), through its Office of Safeguards and Security, promulgated a specific order addressing entry and exit searches for its offices in Washington, DC and Germantown, MD.\textsuperscript{52} It states that employees with photo ID badges will not be subject to routine searches but they and their belongings may undergo random searches upon entering or exiting the facility.\textsuperscript{53} Additionally, DOE has promulgated comprehensive security orders for protection of its facilities, buildings, property, and employees in the interest of national security interests where property includes classified information, special nuclear material (SNM), and nuclear weapons.\textsuperscript{54} The order states, “Personnel, vehicles, and hand carried items including packages, briefcases, purses, and lunch containers are to be inspected to deter and detect unauthorized removal of classified matter or other safeguards and security interests from designated security areas.”\textsuperscript{55} Methods of inspection include metal detectors, X-ray, and special procedures to prevent removal of nuclear materials.\textsuperscript{56}

Several other government agencies perform random or mandatory exit searches, including the Smithsonian Institution,\textsuperscript{57} the National Zoological Park,\textsuperscript{58} the U.S. Government Accountability Office,\textsuperscript{59} as well as the National Security Agency offices.\textsuperscript{60}
3. Military Facilities Regulations

The DoD has its own body of law. As mentioned earlier in this paper, the Internal Security Act is the overarching statute for military security procedures. Each installation commander is responsible for designing the procedures and processes used for entry and exit security and searches at her installation. This all-encompassing authority is premised on the commander’s responsibility for all people and property on the installation.

Private contractors, employed by the government to perform work on the installation are also subject to exit searches. One contractor who has been working at multiple facilities for more than 10 years has been subjected to a car search just once during that timeframe. Another stated that the random car searches were not normal, but only performed in times of increased security. As an example, he had only experienced one car search in his career, explaining, “All departing vehicles were searched when a Marine Corps-issued rifle went missing and was unaccounted for. It was a cluster to say the least. They searched every car until they located the weapon.”

As an exception, and possibly a more Constitution-friendly solution to the security issues facing military installations, some military facilities have areas and buildings requiring additional security screening or an escort, such as “special” weapons storage areas or very highly secure areas. In these cases, a person will likely have a military escort even to get into a building and

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64 Email from Aimee Kambhu (Feb. 24, 2016) (on file with author); See also email from Doug Johnson (Feb. 25, 2016) (on file with author).
65 Kambhu supra note 64.
66 Johnson supra note 64.
then they must lock up and leave behind all electronics before entering, rendering searches unnecessary.67

B. State Constitutions

Every state constitution includes a clause, similar to the Fourth Amendment, which protects its citizens from unreasonable searches and seizure of person and property by the government.68

C. Common Law Tort of Invasion of Privacy

In 1890, Samuel D. Warren and Louis D. Brandeis published, The Right to Privacy, an article calling for courts to recognize a new cause of action for invasion of a person’s privacy.69 They found that society’s advances were intruding upon a person’s inherent right to choose what she wanted to keep private and what she wanted to share with the world.70 They felt there must be protection from such invasions on a person’s “right to be let alone.”71 It took courts decades to adopt this point of view but slowly, the tort of invasion of privacy took shape.72 Finally, in 1960, William L. Prosser, Dean of the University of California, School of Law at Berkeley, published an article which examined the breadth of privacy case law which had developed through the decades.73 He determined that, “[t]he law of privacy comprises four distinct kinds of invasion of four different interests of the plaintiff.”74

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67 Id.
70 Id.
71 Id.
73 Id. at 224.
74 Id.
The Restatement (Second) of Torts, recognizes these four separate types of invasions of privacy.\textsuperscript{75} The first, “One who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the intrusion would be highly offensive to a reasonable person.”\textsuperscript{76} is the relevant tort for the purposes of these employer forays into the personal items of their employees. An employee must prove the following elements of the tort: (1) there was an intrusion; (2) the intrusion was intentional; (3) the intrusion was upon the plaintiff's solitude or seclusion, or his or her private affairs or concerns; and (4) the intrusion would be highly offensive to a reasonable person,\textsuperscript{77} in order to prove that her employer has intruded upon her seclusion.

D. Private Employer Search Protocols

Integrity Staffing Solutions is a company that staffs warehouses for Amazon across the country.\textsuperscript{78} Its hourly employees fill orders by retrieving items from the warehouse shelves and readying the items for shipping.\textsuperscript{79} Integrity Staffing Solutions requires that all of its employees, go through exit searches when they leave the premises.\textsuperscript{80} The security screening is similar to that which one goes through at the airport. Each employee must empty his or her pockets, remove belts and pass through a metal detector before leaving the premises.\textsuperscript{81}

CVS distribution center employees also face security screenings when entering and exiting the facilities. Any time the employees leave the distribution center, they must place their

\textsuperscript{75}\textsuperscript{Restatement (Second) of Torts § 652A (1977) (The four kinds of invasions are (1) an unreasonable intrusion upon the seclusion of another; (2) appropriation of the other's name or likeness; (3) unreasonable publicity given to the other's private life; and (4) publicity that unreasonably places the other in a false light before the public).}

\textsuperscript{76}\textsuperscript{Restatement (Second) of Torts § 652B (1977).}

\textsuperscript{77}\textsuperscript{Id.}

\textsuperscript{78}\textsuperscript{Integrity Staffing Solutions, Inc. v. Busk, 135 S. Ct. 513 (U.S. 2014).}

\textsuperscript{79}\textsuperscript{Id. at 515.}

\textsuperscript{80}\textsuperscript{Id.}

\textsuperscript{81}\textsuperscript{Id.}
work tools in their lockers, gather their belongings from their lockers, and submit to an employer-mandated security screening. The security screenings include a thorough search of employees' bodies and belongings. CVS’s policy states in part that, “[t]he security officer or manager conducting the check will request that the person being checked open any bags, purses, packages, coats, thermos, and tool boxes or move any items within the bag, as well as take any item out for a closer inspection.” The searches can include the employees’ bodies, as well as a bag search, including the need for employees to remove items from bags for closer inspection; all justified by CVS to deter theft of merchandise and company property.

The exit search procedures at Coach Stores put a significant burden on the employee to ensure the search is performed. Coach has a loss prevention/security policy in place that requires all sales associates to submit to a bag check, performed by a store manager, before leaving the store for breaks and at the end of the day. When the associate is ready to leave the store, she must, “locate a manager, request that the manager conduct a “bag check,” undergo the “bag check,” and then be escorted out of the store by the manager.”

Exit searches have been used at construction sites in an attempt to curb theft of tools by workers. Gate searches, sometimes using metal detectors, were performed as employees left the job site for the day strictly as a theft deterrent. If employees were carrying anything suspicious or

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84 Id. at ¶ 19 (“The security screenings prevent theft by Employees because Defendants believe that the security screenings deter Employees from stealing CVS merchandise and/or property and, if Employees are not deterred, enable Defendants to intercept stolen goods.”).
86 Id.
87 Id.
a container which could be used to take materials, they would be searched, otherwise they could leave the site unmolested.

E. Government Security Framework

In 1995 after the Alfred P. Murrah Federal Building in Oklahoma City was bombed, the President directed the Department of Justice to perform a vulnerability assessment of all federal facilities, and to recommend minimum security standards for federal facilities. A committee of security specialists from various federal agencies developed minimum standards for building entry, interior security and security planning, among other issues. Entry issues include entrances, exits and access control.

As part of this exercise, the committee split federal facilities into five categories, Level I through Level V, with differing security needs for each level, based on several factors including number of employees, type of federal use, public access needs, etc. The committee then detailed the types of security measures facilities at each level should implement. Based on the missions of the agencies in Levels II through V, the committee required visitor control systems for these facility levels. The final vulnerability assessment report recommendations considered funding, necessary upgrades, and increased security responsibilities for several agencies/groups.

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90 Id. at 1-1.
91 Id.
92 Id. at 2-3 to 2-5 (A Level I facility has under 10 employees and likely has a small foot print and limited public contact. A Level II facility, has between 11 - 150 federal employees. In addition, has from 2,500 - 80,000 sf, a moderate volume of public contact; and activities that are routine in nature. A Level III facility has between 151 and 450 employees and is likely to be from 80,000 - 150,000 sf, a moderate/high volume of public contact; and houses agencies that may include law enforcement agencies, court/related agencies and functions, and government records and archives. A Level IV facility has over 450 federal employees and likely has more than 150,000 sf, a high-volume of public contact; and may include high-risk law enforcement and intelligence agencies, courts, judicial offices, and highly sensitive government records. Level V facility is a building such as the Pentagon or CIA Headquarters that contains mission functions critical to national security, it will be similar to a Level IV facility in terms of number of employees and square footage).
93 Id. at 2-6 to 2-9.
The key activities performed upon facility entry are authenticating and screening the personnel. Employees validate who they are and their purpose for entry into the building by showing IDs, entering key codes or using biometrics as they pass through security. In some cases this is all that is required. In other facilities, they must, at the same time, pass through metal detectors, wand searches, etc. and their bags pass through x-ray machines. All of this is done in the name of security, and circles back to “Title 41, Code of Federal Regulations, Part 102-74, Subpart C,” which sets forth the rules and regulations for conduct on Federal Property, and is often posted in government buildings.

Until 2002, the Federal Protective Service (FPS) was a sub-organization of the GSA, responsible for providing security services for GSA-controlled federal facilities. In 2002, the FPS was moved to the Department of Homeland Security in an effort to consolidate protection of federal facilities. That being said, the security personnel performing exit searches in federal facilities are not uniform. The FPS provides a significant portion of the security at facilities but many agencies, including BEP and the Postal Service, have their own police forces.

III. ANALYSIS

This section explores the courts’ assessments of exit searches, where they have applied the relevant laws and regulations. In the absence of court decisions, it discusses how relevant case law could be applied and considers methods of minimizing the intrusiveness of these searches.

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A. Military Installations

It is the right of the installation commander to determine the search policies and procedures of each installation.\footnote{Military Police \textit{supra} note 62, at 2-3.} At the entry gates of most installations, there are signs posted warning all who enter, civilian employees, military personnel, and visitors that their cars, persons and possessions can be subject to search at any time.\footnote{Lieutenant Commander Paul A. Wille, USN \& Commander George B. Catlin, USNR, \textit{Shakedown--Main Gate Searches of Departing Civilians}, 21 JAG J. 132, 133 (May-June, 1967).} Oftentimes, that notice, and subsequent entry onto the installation, which is construed as consent,\footnote{\textit{Id.} at 134.} can be enough to overcome a person’s Fourth Amendment right of privacy from unwanted searches without probable cause or a warrant. Military Courts have been split on whether these exit search policies are constitutional, as discussed below.

In \textit{U. S. v. Keithan},\footnote{\textit{U. S. v. Keithan}, 1 M.J. 1056 (1976).} the court held that protection of government property, in other words, preventing theft, is a valid reason to randomly intrude on a person’s privacy, while preventing criminal activity, possession of drugs, is not. A random exit search was performed on a car that was leaving the base and drugs were found in the possession of one of the passengers. In the original court martial, the drugs were allowed into evidence. Upon appeal, the court stated, “[R]andom inspections of outgoing vehicles and personnel, without reasonable cause, within the United States, under peacetime conditions, are violative of the Fourth Amendment.”\footnote{\textit{Id.} at 1058.} The Court defined reasonable governmental interests for an exit search as protecting government property, preventing escape from confinement or custody, or ensuring national security.\footnote{\textit{Id.}}
Another court also held that a government employer’s interest in protecting its property offset an intrusion into an employee’s private possessions in *U.S. v. Gonzalez*. This case involved another random exit search, this time of an employee of an Air Force Base Exchange. The store detective performed random bag searches when employees left the establishment, as part of an established policy. Employees were informed of the policy before they began working at the Base Exchange and were required to sign or initial a paper acknowledging the potential search and their acquiescence to it. Thus, when Mr. Gonzalez was stopped for the search, he had notice and consented to the search. The *Gonzalez* Court noted that the court in *O’Connor v. Ortega* found that government employees did not give up their Fourth Amendment protections just because they worked for the government and that a piece of personal baggage is not necessarily the correct standard for a workplace search. But the *Ortega* Court considered, “reasonableness, rather than probable cause was the standard, balancing the employees’ legitimate expectations of privacy against the government’s need for supervision, control, and the efficient operation of the workplace.” The *Gonzalez* court followed this lead and found the government employer’s interest in ensuring the availability of store merchandise outweighed the employee’s privacy interest even though there was no individualized suspicion.

In contrast, the appellate court found that the search procedures exercised in *U.S. v. Harris* were unreasonable and an invasion of Harris’ privacy. Harris was a passenger in a car entering a military installation that was stopped for a search. Drugs were found in his

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104 300 F.3d at 1048.
105 *Id.* at 1051.
106 *Id.* at 1052.
107 *Id.* at 1053.
108 *Id.*
109 *Id.* at 1055.
111 *Id.*
possession and he was convicted by the military trial judge.\textsuperscript{112} In the lower court, the government argued that the search was lawful under the authority of the base commander, “Authority is hereby delegated to the Provost Marshal to conduct random inspections of any vehicle seeking to enter or leave Marine Corps Base, Twentynine Palms, to prevent the removal or introduction of contraband or the illegal entry or departure of persons.”\textsuperscript{113} Harris argued that the search procedure was not random, as called for in the regulation, and thus was a violation of his Fourth Amendment right. The military policeman who performed the search in question explained that his procedure was to choose whichever car came to the gate when his dog was ready to work.\textsuperscript{114} A second policeman responsible for gate searches explained that he stopped every fourth car.\textsuperscript{115} Based on the inconsistency of the “random” search procedures, Harris appealed the decision.

The appellate court agreed with Harris, that because the law enforcement officer was permitted to exercise discretion regarding the search procedure, that the search was unreasonable.\textsuperscript{116} The court set forth a standard for constitutionality of U.S. installation gate searches. In recommending a methodology to be used, the \textit{Harris} Court contemplated an administrative search procedure, stating that, “[A] procedure must be employed which completely removes the exercise of discretion from persons engaged in law enforcement activities. This contemplates a completely independent determination of times when the searches will be conducted, the method of selecting the vehicles to be stopped, the location of the operation, and the procedure to be followed in the event something is discovered.”\textsuperscript{117} Thus, a search initiated by the security personnel at the gate on his own initiative, or not following the

\begin{itemize}
\item \textsuperscript{112} \textit{Id.}
\item \textsuperscript{113} \textit{Id.} at 46.
\item \textsuperscript{114} \textit{Id.} at 45.
\item \textsuperscript{115} \textit{Id.} at 46.
\item \textsuperscript{116} \textit{Id.} at 66.
\item \textsuperscript{117} \textit{Id.} at 65.
\end{itemize}
commander’s express instructions, could be found in violation of the employee’s privacy rights. “[T]he Fourth Amendment will not tolerate that degree of discretion to search private automobiles . . . A search, even of an automobile, is a substantial invasion of privacy.”\textsuperscript{118} If though, the standards for the search are clearly outlined and authorized by the installation commander and known and followed by gate law enforcement, a court will likely uphold the search, prevailing over the privacy interests of the employee. “[T]he commanding officer's traditional authority and responsibility for the security of a military base and its personnel are sufficiently broad to permit him constitutionally to search all those who enter or leave the installation's perimeters.”\textsuperscript{119}

These cases demonstrate that the facility commander, whether that facility be a base, ship, or some other entity, can dictate the procedures that are used for exit searches. Protecting the security of government property and personnel are the compelling government interests for these searches and it is unlikely that an invasion of an employee’s Fourth Amendment interest will be given more weight by a Court if the search follows set procedures and is securing government property.

This paper acknowledges the necessity of protecting sensitive government property. There is a difference though, between protecting government property which is entwined with security and safety needs, and protecting the kind of government property that falls into a more of general category, as in Gonzalez. For that reason, the search procedures should be tailored to the duties of the employees, to ensure the searches serve the needs of the compelling interests mentioned above, and no lesser interests. Installation personnel who have access to property that falls into the former category should be given different forms of identification and car

\textsuperscript{118} Id. at 56-57 (quoting United States v. Ortiz, 422 U.S. 891, 896 (1975)).
\textsuperscript{119} Id. at 60 (quoting United States v. Poundstone, 46 C.M.R. 277 (1973)).
stickers/tags, and subject to search procedures guided by *Harris*. Those employees who cannot gain access to information or property that involves safety or security, should be identified differently and be allowed to leave unmolested. In order for those employees to be subject to an exit search, the Fourth Amendment protections should prevail and the employer must have probable cause or procure a warrant. Additionally, any employee who will be subject to an exit search should be given notice prior to accepting employment, so she has notice and can make an informed decision from the start. Signs that specifically list the potential of an exit search should be clearly posted prior to entry to reinforce their existence to all daily workers at the facilities and other government employees who may be visiting for business reasons. These standards will help to minimize the privacy invasions.

B. Federal Agencies

In the case of non-military governmental employers, the nature of the business of many of these agencies – protecting national security and securing the nation’s treasures – gives employers a lot of latitude for invading their employees’ privacy through background checks, video surveillance, and other means. One wonders if these employees need to suffer the indignities of intrusions into their pockets and bags too. It would seem that they do not protest these indignities though, as while researching this paper, no information was found regarding federal employees challenging their employers on the constitutionality of exit searches. Thus, there is no case law as to how courts would address this specific type of intrusion into an employee’s Fourth Amendment rights.

The most logical starting point to assess the constitutionality of these exit searches is the standard fashioned by the Court in *O’Conner v. Ortega*.[120] The Court found that, “[W]hat is a

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[120] 480 U.S. 710.
reasonable search depends on the context within which the search takes place, and requires balancing the employee's legitimate expectation of privacy against the government's need for supervision, control, and the efficient operation of the workplace.”

Dr. Ortega ran a residency program at a state hospital. Hospital officials noticed irregularities in the program management and launched an investigation. As part of the investigation, Dr. Ortega’s employer conducted a search of his office, including his desk and file cabinets, during which they seized personal items used against him in proceedings before a state hearing board. Ortega claimed that this search was a violation of his Fourth Amendment rights. The Court agreed, stating that Ortega had a reasonable expectation of privacy in his desk and file cabinets, especially since he did not share them with any other employees.

Based on a search of one’s office files and desk by an employer being found to be unconstitutional, one would think a search of one’s purse and briefcase would also meet this standard. But, the Court went on to hold that there are two situations in which government searches would not violate the Fourth Amendment: 1) to retrieve work-related materials and 2) to investigate work-related rules. This could be interpreted to mean that exit searches are constitutional when the government agency’s “work related materials” are confidential or precious documents and/or the workplace has regulations regarding what may not be removed from the office. However, a different interpretation, specifically that the employer is merely trying to prevent theft of ordinary property, does not completely remove the possibility of future Fourth Amendment violations.

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121 *Id.*
122 *Id.* at 712.
123 *Id.*
124 *Id.* at 713.
125 *Id.* at 717.
126 *Id.* at 732.
In concert with these exceptions to the probable cause and warrant requirements of the Fourth Amendment, the Court has recognized several exigent circumstances where “special needs” make the requirements of probable cause or obtaining a warrant unduly burdensome on the government.\textsuperscript{127} Where special needs are advanced, the Court would employ a reasonableness standard and a weighing of the interests of the employee and the governmental employer.\textsuperscript{128} As noted in \textit{Ortega}, “In many cases public employees are entrusted with tremendous responsibility, and the consequences of their misconduct or incompetence to both the agency and the public interest can be severe.”\textsuperscript{129} For this reason, one can assume that just as in the case of searches at military installations, if a government employee were to challenge an employer’s exit search procedures for violating her privacy rights, the court would most like find a “special needs” exception and the outcome would most likely favor her employer.

Given the inevitability of the courts siding with the government agency, it should minimize the intrusion upon its employees during these searches. Using a clearly defined process, transparent to all, should keep the employers well within the exceptions of the Fourth Amendment and state constitutional limits.

The first step in establishing a clear and fair process should be using the government security framework.\textsuperscript{130} Based on the information in the Department of Justice (DOJ) and GSA reports, Level I and Level II facilities should not house organizations with national security and

\textsuperscript{127} See Camara v. Mun. Court, 387 U.S. 523 (1967) (holding that a warrant requirement is not appropriate when “the burden of obtaining a warrant is likely to frustrate the governmental purpose behind the search”); See also 480 U.S. at 723 (“[W]here a careful balancing of governmental and private interests suggests that the public interest is best served by a Fourth Amendment standard of reasonableness that stops short of probable cause, we have not hesitated to adopt such a standard.” Internal quote deleted); \textit{Compare} New Jersey v. T.L.O., 469 U.S. 325, 351 (1985) (“Only in those exceptional circumstances in which special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable, is a court entitled to substitute its balancing of interests for that of the Framers.”).

\textsuperscript{128} 480 U.S. at 725.

\textsuperscript{129} Id at 724.

\textsuperscript{130} See supra Section II.E.
treasures issues, so they should never have a compelling interest in exit searches. Employees working for these agency offices should never have to be searched on their way home at night. Level III and IV facilities could house agency offices with more urgent security needs, as these agencies are designed to deal with sensitive government archives and records, as well as intelligence agencies, each being a case for which some type of exit search may be necessary. Level V facilities, by definition, deal with functions critical to national security, and thus, the government’s compelling interest in safeguarding the property in these facilities is undeniable.

Once the correct level is established for an agency, the guidelines can be referenced to determine which types of exit protocols, if any, are necessary – magnetometers, x-rays, etc. The agency can then promulgate its own regulations under the authority of 41 C.F.R. §102-74.370. Government agencies should give prior notice to and receive consent from potential new hires before employment begins. Where possible, if personnel in the facility do not have the ability to access confidential or sensitive government property, they should be identified as such and be exempt from the searches.

Based on the research for this paper, it appears that the government has carefully considered the missions of its agencies and has limited the use of exit searches to those with compelling interests, and tailored the searches as best it can to limit the intrusions upon its employees.

C. Private Employers

A variety of private employers perform exit searches, including retailers, chemical and precious metals manufacturers, nuclear power plants and construction contractors. Like the federal agencies, the research for this paper unearthed no challenges to exit searches by employees specifically addressing an invasion of privacy. The common challenge to exit
searches by employees was a demand for compensation for the time the employees had to spend undergoing these invasive procedures, which provided benefit only to the employers.

In late 2015, in a California wage and hour class action suit, the judge granted summary judgment for the defendant declaring that if employees wanted to avoid exit searches, they should not carry bags or other possessions to work.\textsuperscript{131} Frlekin v. Apple, Inc. was a class action suit involving current and former employees of Apple’s retail stores contending that the employees should be paid for the time involved in the mandatory exit searches. Apple instituted a written policy for mandatory bag and device checks, any time an employee exited the store, to prevent employee theft of its products.\textsuperscript{132} The policy stated that all employees had to undergo a check of all bags and packages, as well as verifying that they owned any Apple devices which they were carrying at the time of exit.\textsuperscript{133} To enable the technology check, each employee had a Personal Technology Card, identifying the products they owned by serial number.\textsuperscript{134} The onus was on the employee to find a manager or security guard, if the store had security, to perform the exit search before leaving the store.

Apple had also published guidelines establishing what was entailed in an exit search.\textsuperscript{135} The procedures required that every bag, backpack, etc. be opened and visually inspected.\textsuperscript{136} Any item or device in the employee’s possession that could be sold in the store, had to be removed from the bag and verified against the technology card.\textsuperscript{137} If there were zipped compartments or smaller bags in the bag, they also had to be unzipped and opened for visual inspection.\textsuperscript{138} If a

\textsuperscript{132} Id. at 1.
\textsuperscript{133} Id.
\textsuperscript{134} Id.
\textsuperscript{135} Id.
\textsuperscript{136} Id.
\textsuperscript{137} Id.
\textsuperscript{138} Id. at 2.
suspicious item was seen in the bag, the employee was asked to remove it, “Apple will reserve the right to hold onto the questioned item until it can be verified as employee owned. (This will make the employee more aware to log in all items at start of shift.)”¹³⁹

In granting the summary judgment, the Court considered whether the employees were under the control of the employer during the time of the search and to determine control, looked at two elements: 1) whether the employer restrains the employee’s actions during the activity, in this case the search, and 2) whether the employee has no way to avoid the activity.¹⁴⁰ The court found that, “the first element is met, namely control, for once the worker wishes to leave with a bag, the worker is restricted and must stand in line for the security screening. The second element, however, is not met, for the Apple worker can choose not to bring to work any bag or other items subject to the search rule.”¹⁴¹

The Court was seemingly untroubled by the invasive procedures documented in the pleadings. There were no dicta in the analysis regarding the uneven treatment of the employees; the court just told these employees they could avoid the search by not carrying their personal belongings to work.

Private employers enjoy more freedom to intrude on the privacy of their employees, since they are not necessarily restricted by the Fourth Amendment. These exit searches, though, definitely come within the confines of the tort of intrusion upon seclusion.¹⁴² Given the protocols of private employer exit searches discussed within the paper, there is no doubt that a search meets the first three elements of the tort: (1) an intrusion; (2) the intrusion was intentional; (3) the intrusion was upon the plaintiff’s solitude or seclusion, or his or her private affairs or

¹³⁹ *Id.*
¹⁴⁰ *Id.* at 3.
¹⁴¹ *Id.*
¹⁴² Restatement (Second) of Torts § 652B (1977).
concerns. As Prosser stated that, “there must be something in the nature of prying,” and “the thing into which there is prying or intrusion must be, and be entitled to be, private.” What could be more invasive than someone peering into one’s purse or looking through the contents of one’s pockets?

The difficulty for employees is proving element four of the tort, that the intrusion is highly offensive to a reasonable person. “There is . . . no liability unless the interference with the plaintiff’s seclusion is a substantial one, of a kind that would be highly offensive to the ordinary reasonable man, as the result of conduct to which the reasonable man would strongly object.” Reasonableness in this context is determined by the balancing of the employee’s privacy interest against the employer’s business-related interest. Thus, if the employer has an important and legitimate interest for the search, the employee will lose on element four.

For the majority of private employers, the only interest at stake is theft prevention. The U.S. leads the world in retail theft by employees. The global rate of employee theft, versus total theft, is 28% while U.S. employees account for 43% of the merchandise shrinkage. The Global Retail Theft Barometer Study 2015, backs employers’ use of exit searches by listing search fixtures and manual screenings among its Top five methods to prevent theft. Given these facts, and declarations from courts stating, “Prevention of theft is a legitimate justification for a search. It’s hard to run a store if the employees walk out with the inventory . . . it’s at least

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143 *Id.*
144 O’Gorman, *supra* note 72, at 224-25 (quoting Prosser).
146 O’Gorman, *supra* note 72, at 262 (quoting King).
148 *Id.*
as important as assuring that high school students are not smoking cigarettes in the bathroom, which was the justification for searching the schoolgirl's purse in *T.L.O.*, it is hard to believe any employee will be able to convince a court that an employer has overstepped his authority by requiring the employee to open her purse to the prying eyes of her manager or a security guard.

Additionally, in many of the cases, the employer has a policy in place notifying the employees of the existence of bag searches, and some have employees sign forms or releases, further reducing, in the court’s eyes, a reasonable expectation of privacy on the part of the employee.

All of this aside, mandatory and random exit searches in the context of most private employers should not be allowed without probable cause or individualized suspicion. (Private employers, whose products could be security or safety risks being the exception to this rule.) Unfortunately, due to the inequity of at-will employment, employees are not willing to challenge the search. An employee who does protest incurs a real risk of being fired for refusing the search. Thus, even though exit searches trample the privacy rights of the employees, they are likely here to stay.

If an employer is going to perform searches, it should be incumbent upon each employer to set forth clear processes and procedures to be followed by the people performing the search in order to minimize the intrusion into the employee’s privacy. The process must begin before an employee is hired. Employers should also be required to give employees advance notice regarding the existence and extent of these searches, so new hires take this intrusion into consideration while they are making an employment decision. The policies must be given to all employees in the same manner. For example, in *Frlekin*, Apple’s search policy and guidelines

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150 300 F.3d at 1054.
were available to employees on various technology platforms, but there was no set procedure for distribution of the policy to ensure notice.\textsuperscript{151} Under these suggested standards, this would not be acceptable.

The employer must standardize the search across its whole organization, limit searches to only those employees who are in contact with the particular property about which the employer is concerned, and standardize who performs the search. Again, Apple’s policies are an example of how this shouldn’t be done. Apple did not define what a bag was, for the purpose of a search, to ensure that like items were always searched.\textsuperscript{152} Its search procedures varied from store to store.\textsuperscript{153} One Apple store ceased performing the checks altogether, “after receiving a complaint from an employee that searches ‘did not show trust and respect for [Apple] employees.’”\textsuperscript{154}

IV. CONCLUSION

There are currently a variety of employers across the country, both public and private, that use exit searches when their employees leave the workplace for breaks, meals or at the end of the work day. These searches are without a doubt an intrusion upon the employees’ Fourth Amendment rights and a violation of the tort of invasion of privacy. Unfortunately, with government employers claiming interests of protecting national security, public safety and national treasures, and with private employers asserting an interest of protecting their property and inventory, there is little chance these intrusive searches will disappear, even if employees try to litigate the issue.

\textsuperscript{151} Frlekin v. Apple Inc., 309 F.R.D. 518, 520 (N.D. Cal. 2015).
\textsuperscript{152} Id.
\textsuperscript{153} Id. at 521. Some stores had off-store spaces where workers could store personal bags and devices, so there were no searches at all. In stores without security, the managers performed the exit searches, while in stores with security personnel, the search could be performed by a guard or manager depending on their availability. Also, over time the search procedures in any particular store could change because of the addition of guards or changes in store management personnel and philosophy.
\textsuperscript{154} Id.